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THE LEGAL IMPLICATIONS OF THE CHANGING NATURE OF EMPLOYMENT IN MALAYSIA

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Introduction

As we head towards pervasive globalisation, knowledge-economy and electronic commerce, the impact of policies and strategies to meet the new demands of the marketplace on the work force, have far reaching consequences. Not only will the work force have to meet these challenges to traditional forms of employment but the very nature and perception of the employment relationship will have to evolve to cater to and meet the demands of the modern economy of Malaysia. In tandem with these developments will be the requirement for labour or employment laws to keep pace with these changes. This article looks at some of the issues relating to the changes in the nature of employment and the judicial trends in relation to the employment relationship.

The Changing Nature of Work - The Atypical Worker

In Malaysia, the employment relationship is regulated primarily by the Employment Act 1955 and the Industrial Relations Act 1967 with respect to the contract of service and contract of employment respectively. Although in both Acts the contracts of service and employment have been defined respectively, they do not clearly reflect the employment relationship. The Employment Act 1955 (hereinafter called the EA 1955) defines a contract of service as "any agreement whether oral or in writing ... whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee".[1] On the other hand, the Industrial Relations Act 1967 (hereinafter referred to as the IRA 1967) refers to a contract of employment as "any agreement, whether oral or in writing ... whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman".[2]

The employee or workman[3] must be identified as such, under a contract of service or contract of employment (note, both terms are used interchangeably) unlike the independent contractor in a contract for services who is either self-employed or running his own business. Identification of the contract of employment is vital for the

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1 Section 2(1) Employment Act 1955.

2 Section 2 IRA 1967.

3 As a result of the decision in *Hoh Kiang Ngan v Mahkamah Perusahan Malaysia* [1995] 3 MLJ 309, the Federal Court has ruled that a workman is considered to be one who is engaged under a contract of service.

worker. This is because unless the worker comes within the "magical circle" of the contract of service, he will not be able to access any statutory and common law remedies. As the statutory provisions have not clearly spelt out the nature of the contract of service, it has been left to the courts to flesh out what constitutes this employment contract by looking out for various characteristics to identify it by. This exercise has been carried out on the basis of a contract - ie, the wages for work bargain as agreed upon by both parties, the employer and the employee.

As has been noted by various academic writers and jurists, the use of the concept of the contract to clothe the employment relationship is both unrealistic and inadequate. For one, the employment contract is based on the artificial notion of consensus between both parties which in reality is underscored by the employer's superior economic position over the employee. Rideout for example noted, the contract of employment developed over time as basically "a product of the Industrial Revolution and nineteenth century *laissez faire* its principal justification. ... The concept of the individual contract is irrelevant to the modern employment situation".[4] Secondly, having based the employment relationship on a contractual footing, the courts have been left with the difficult task of identifying and determining the existence of the employment contract so as to allow employees access to statutory protection within the "magical circle" of the contract of service. In what Hepple describes as the "anarchy of judicial concepts," [5] a variety of approaches have been developed by the courtsin order to determine this employment contract. Initially, the employment relationship was characterised by the proverbial master-servant relationship in which ownership and property in labour reflected the underlying subordination and control a master had over his servant's labour.[6] In the master-servant relationship "control" was an integral factor in characterising the employment relationship, ie, the employer's right to command and the employee's duty to obey his instructions. Exploitation, coercion and subordination were at the core of the relationship. As an illustration, in *Collins v Herfordshire County Council*,[7] it was stated that the distinguishing feature of the contract of service was that the master could not only order or require what was to be done but also how it was to be done. The inadequacy of such a test in determining the status of employment was revealed by Sommerville LJ in *Cassidy v Ministry of Health*[8] when he referred to the case of a certified master of a ship. The owner of such a ship may employ the master of the ship under a contract of service and yet the owner has no power to tell the master how to navigate the ship.

Thus in situations where professional, highly skilled employees were concerned, the notion that the individual was the "servant' of the employer because the latter was in "control" of the performance of his work was severely challenged. In

4 RW Rideout, "The Contract of Employment" (1996) CLP at 112.
5 Bob Hepple, "Restructuring Employment Rights", (1986) *15* ILR 70.
6 Bramwell J in *Yewens v Noakes* (1881) provided the classic statement that an employee is "subject to the control of his master as to the manner in which he shall do his work".
7 [1947] 1 All ER 633, [1947] KB 598.
8 [1951] 1 All ER at 579, [1951] 2 KB 343 at 352.

Cassidy, it was acknowledged that if the servant is a surgeon, the employer may well not only, not know how to perform the work but also how to control its execution. This absolute requirement to establish control as an integral ingredient in identifying the contract of employment then becomes quite unrealistic in cases where the employee is likely to be more skilled than the employer.

Another problem with the control test is that it could not keep abreast of the changing economic and social conditions. The traditional and archaic categories of servants such as domestic servants and labourers working in farms and factories have given way to new forms of employment which are essentially skills based and where work is carried out in totally different economic environments.

In view of the above problems, various other tests were formulated which include the business organisation or integration test[9] and the more adaptable multiple test of McKenna J in *Ready Mixed Concrete (SE) Ltd. v Minister of Pensions and National Insurance,*[10] which seeks to take a more pragmatic approach to the economic realities of the employment relationship. More recently another consideration has been the development of the mutuality of obligations (ie, to do work and to be provided with work) requirement to establish a stable and longstanding relationship with the employer.

Another test referred to as the fundamental or entrepreneurial test asks the question: Is the worker in business of his own? If the answer is no, then he is an employee under a contract of service. Such an approach recognised the economically dependent position of employees. Thus it was that in *Market Investigations v Minister of Social Security*[11] that 470 casual market researchers could not have been in business of their own and had to be viewed as employees.

With the wide ranging tests available to identify the contract of service, it is no wonder that Gopal Sri Ram, JCA noted in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor*[12] that "there is not a single satisfactory test that is available for the determination of the issue" (of workman) and that the degree of control exercised by the employer remains an important factor although it may not be the sole criterion. Hence, the court's approach in deciding whether the claimant is a workman under the IRA 1967 is not to be concerned with the "nomenclature or position held by the claimant" but rather to examine the duties and functions of the claimant to decide whether he or she is under a contract of service and thus a workman and not under a contract for service, and, therefore not a workman.

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9 Lord Denning introduced it in *Stevenson, Jordan & Harrison v McDonald & Evans* [1952] 1 TLR 101. It involves the question of whether the employee was fully integrated into the organisation for which he worked, so as to make him a employee.

10 [1968] 2 QB 497. Essentially the test involved the consideration of such factors as the consideration of wage for work and skill in performance of service, the degree of control exercised and the existence of other provisions consistent with there being a contract of service. The test was clearly explained in *Market Investigations v Minister of Social Security* [1969] 2 QB 173.

11 [1968] 3 All ER 732 (QBD).

12 [1995] 3 MLJ 369 at 392.

With the changing nature of employment, there is also the need to deal with what are termed as "atypical" workers - free-lancers, part-timers, home-based, or even on-line workers who work fixed term, short term, casually or even on a one-off basis. Where do they fit in within the "magical circle of the contract of service" so that they may be recognised as employees and as such have access to statutory employment protection?

As noted by Sandra Fredman,[13] recession, soaring unemployment, global competition and new technology underpin the necessity for recognising flexibility in the workforce. With this increased flexibility of employment relationships comes the insecurity in pay and job security. Economic change has caused a decline in continuous full-time working and an increase in part-time and temporary working, self-employment and other forms of marginal working.[14]

This "flexibility" of employment relationships reflects a broad spectrum of work relationships that operate between two extreme stereotypes of work relationships, ie, the dependent worker identified with the contract of employment/service and the independent worker identified with the contract for services. The atypical worker of today finds himself/herself in a web of contracts and obligations which do not even remotely resemble the bi-partite contract of service of old. There may be relationships described[15] as independent business relationships but which in reality are not only work relationships but are dependent relationships as seen in the case of franchising arrangements, agency work, consultancies etc. On the other hand, what about workers who are so highly integrated into the employment enterprise that it puts them in a proprietal role as seen in the case of salaried partners of professional firms and who may not be recognised as employees under the current labour laws?[16] It would thus seem too simplistic and artificial to attempt to categorise employees within these two exclusive and extreme stereotypes – one, the employee in a contract of service or employment and the other, the independent contractor in a contract for service(s).

As a result of decisions in the United Kingdom like *O'Kelly v Trusthouse Forte Plc*[17] and later in *Mcleod & Ors v Hellyer Brothers Ltd*,[18] the Court of Appeal has reiterated the need for "continuing mutual obligations" between the employer to provide work for the employee and the need for the employee to serve the employer on a continuing basis as being the "irreducible minimum of obligation" to support the existence of the contract of service. This view was then supported by the House of

13 S Fredman, "Labour Law in Flux: The Changing Composition of the Workforce" (1977) ILJ Vol 26, No 4.

14 Ibid at 337.

15 See, for example, the case of *Ferguson v John Dawson* [1976] All ER 817 (CA), where although the employee was expressly described as being engaged as a "self-employed labourer and contractor", the court chose to ignore this self description of the employment relationship.

16 In Malaysia, the *Hoh Kiang Ngan* decision, n 3, states that a "workman" for purposes of the IRA is one under a contract of service. Nonetheless, the barrier to recognition as an "employee" (ie, one in a contract of service) under the EA as per the monetary limits prescribed will necessarily exclude certain catergories of workers under the EA provisions.

17 [1983] IRLR 369 (CA).

18 [1987] IRLR 232.

Lords in *Carmichael & Anor v National Power Plc,*[19] which held that the absence of mutuality of obligations during the periods the applicant guides were not working resulted in them not being recognised as employees due to the requirement of continuity of service under the relevant statutory provisions.

All these cases involved the atypical worker. In *O'Kelly*, the applicants were "regular casuals" in a hotel, in *Mcleod*, trawlermen were involved in seasonal work as crew members and in *Carmichael*, the applicants were tour guides who took visitors around power stations. What these cases illustrate is the refusal of the courts to accept that flexibility in the nature of work can still create the employment relationship. By insisting on mutuality of obligations between the employer and the employee of a continuing nature, the result has been "to place the employment relationship back in its orthodox pigeon-hole instead of moving forward with the changed economic scenario".[20]

In Malaysia, atypical workers would likewise find themselves in a similar situation. The difficulties noted in fitting these employees within the framework of a contract of service, by looking for its various characteristics such as control, in relation to the "nature, degree and extent of control" and the terms of the contract between the parties (as was noted in the *Hoh Kiang Ngan* case) etc are all hindrances to providing security of tenure to these workers. Thus, even if recognised as employees or workmen, the lack of continuity in work, would then deny them statutory employment rights such as termination benefits and redundancy payments which rest on the requirement of continuous employment.[21]

Perhaps the time is now right for statutory changes in the way the employment relationship is perceived. The description of the employment relationship in terms of the contract of service, which is then to be identified through the archaic and yet still used yardstick of the control test and the need to establish mutuality of obligations on a continuing footing, are barriers to recognising employment relationships in the changing nature of employment today, as seen in the case of the atypical worker.

Judicial Trends in Malaysia as Regards the Employment Relationship.

As noted earlier, the problem with identifying the employment relationship with the contract of service is that it does not always work in modern economic situations where the nature of work and, therefore, the employment relationship itself has changed. The legislature recognises the employment relationship on a contractual footing. In Malaysia, the judiciary however has made some inroads in viewing the employment relationship as something more than just a contractual right.

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19 [2000] IRLR 43 (HL).

20 S. Suhana, "The Contract of Employment, Knowledge Workers, and the K-Economy", *Journal of Malaysian and Comparative Law* (2000) Vols 1 & 2 at 255.

21 See for instance under the Employment (Termination and Lay-off Benefits) Regulations 1980, the employee would have to show a "continuous contract of service" which Regulation 2 states is "uninterrupted service with an employer".

For instance, recent decisions in Malaysia, have created a right to employment equivalent to a proprietary right protected as a fundamental liberty guaranteed under the Federal Constitution. In *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor,*[22] the Court of Appeal's majority decision by Gopal Sri Ram JCA, adopted a broad and liberal meaning to the word "life" in Article 5(1) of the Federal Constitution to include "all those facets of life that are an integral part of life and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment ...".[23] Thus the Court of Appeal construed the right to life under Article 5(1) of the Federal Constitution as including the right to livelihood or employment.

In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan,*[24] the absolute discretion of the Minister to refer or not to refer a dismissal case to the Industrial Court under s.20 (3) of the Industrial Relations Act 1967 (IRA) was considered by the Court of Appeal. Gopal Sri Ram JCA had this to say about the nature of employment, "Parliament intended to elevate the status of a workman ... from the weak and subordinate position assigned to him by the common law to a much stronger position. The legislature has willed that the relationship of employer and workman as resting on a mere consensual basis that is capable of termination by the employer at will with the meagre consequence of paying the hapless workman a paltry sum as damages should be altered in favour of the workman. It has accordingly provided for security of tenure and equated the right to be engaged in gainful employment to a proprietary right which may not be forfeited save and except for just cause or excuse".[25]

Thus in *Hong Leong Equipment*, the court recognised the unequal economic position of the worker in the employment relationship by noting that legislative measures affecting it are based on contract which can only be described as a figment of real agreement or consensus. To provide security of tenure, the right to employment was equated to a proprietary right safeguarded under the Federal Constitution as a fundamental right and to be removed only for just cause or excuse by the employer.

This view has found support from the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor.*[26] As noted by Edgar Joseph Jr FCJ, " ... when the result of an impugned decision may put life or liberty at risk, the duty which rests on the court will be especially onerous"[27] and here, "life" as in *Tan Teck Seng* was held to encompass the right to be engaged in lawful and gainful employment.

Overall, these decisions together can be taken to mean that a workman (who is also taken to mean an employee, in the narrower sense as being under a contract of service under the EA 1955 has a fundamental constitutional and proprietary right to

22 [1996] 1 MLJ 261.
23 Ibid at 288.
24 [1996] 3 AMR 3181.
25 Ibid at 3225.
26 [1997] 1 MLJ 145.
27 Ibid at 190.

employment. It is this fundamental liberty which provides the ordinary worker with security of tenure, which can only be taken away by the employer showing just cause or excuse.

By recognising the right to employment as being more than just a contractual right to a proprietary right protected under the Constitution as a fundamental right, the learned judges have brought our jurisprudence on employment law far ahead of the United Kingdom. Rideout noted "... every worker, to a greater or lesser degree, has an economic interest in retaining his job. If to this we attach rights which are normally incidental to property ... we shall surely approach closely the position in which an initial contract has given rise to status".[28] What then are the implications that flow from such a jurisprudential basis of the right to employment?

For one, by going beyond the contractual framework, various tests will not have to be artificially applied to figure out the employment relationship within the contract of service. As we have seen, the atypical worker does not always fit within the artificially created boundaries of the employment contract. Can we now clothe the employee/workman with the status of employment by looking for the distinguishing characteristics of the employment relationship and not attempt to artificially flesh out a contract of service? Elements such as the obligations of the parties, conduct of the parties and economic dependence amongst others, should then be the indicia of the employment relationship, in order to show that the individual is an employee.

One most obvious result of recognising a proprietary right in employment would be the right to specifically enforce the contract of employment. In the United Kingdom, the common law has never recognised the right to specific performance of contracts of personal service.[29] In Malaysia, although the position is the same under the common law,[30] the Industrial Court, is however, empowered to order reinstatement once it is satisfied that dismissal has not been for a just cause or excuse under section 20 (1) IRA 1967 which states: "Where a workman ... considers that he has been dismissed without just cause or excuse by his employer, he may make representations ... to be reinstated in his former employment".

There is a fine balance that the court draws when providing such relief, especially as the alternative remedy of compensation in lieu of reinstatement is also available. Employers may well resist reinstating dismissed employees and would prefer to pay compensation in lieu to get rid of the employee concerned. The Industrial Court has by way of practice frequently awarded compensation in lieu when harmonious industrial relations have given way to strained relations and loss of confidence between the parties.

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28 RW Rideout, "The Contract of Employment" (1966) CLP at 111.
29 In line with the principle that a contract of employment or personal service cannot be specifically enforced.
30 See *Dato HM Shah & Ors v Dato' Abdullah bin Ahmad* [1991] 1 MLJ 91.

If the right to employment is a fundamental right under the Federal Constitution, then surely such a right deserves to be safeguarded by the Industrial Court attaching more weight to favouring reinstatement of the employee than merely succumbing to the employer's (often lame) excuse that the employment relationship has been too strained to warrant a second go at it.

An approach that lends itself to this view can be seen in *Tanjung Manis Development Sdn Bhd v Florida Tayie Ak Ngaw*,[31] where the Industrial Court in an unjust dismissal case refused to grant compensation in lieu and instead ordered reinstatement of the position. As Industrial Court Chairman, Lim Heng Seng noted:

> The right to security of tenure under s 20 IRA 1967 ... founded upon the right to earn a living has been judicially recognised to be encapsulated within the right to life, a fundamental right enshrined in the Federal Constitution. An employer who has violated the employee's security of tenure should not be lightly excused from reinstating the employee by a general plea that an order of monetary compensation in lieu of reinstatement should suffice. The viability and efficacy of the remedy of reinstatement as a powerful instrument for strengthening and advancing respect for an employee's security of tenure ought not to be undermined by a perfunctory or cursory resort to the remedy of monetary compensation as an alternative to reinstatement.[32]

Where the Court is however unable to grant reinstatement, it will make an award of compensation in lieu of reinstatement. The quantum of compensation payable is a combination of the amount of back wages due and compensation payable at the rate of one month's salary for each year of service (assessment of compensation is on the same basis as on a retrenchment) and the Court then gives a reduction calculated as a percentage of both sums for mitigation of loss, contributory behaviour, delay etc. There is a cap on the award of back wages to 24 months but this norm has not always been followed, especially in cases involving victimization or unfair labour practice.

The assessment of compensation payable on the same basis for a dismissal without just cause and a retrenchment is an oversimplification and an oversight which ignores the fact that on a dismissal, the employee loses not only his job but also his seniority at the workplace and all the intangible benefits that accrue with such years of service. All that the employer needs to do is to pay compensation equivalent to retrenchment benefits to get rid of him/her. The loss of employment is a traumatic experience for the employee concerned and his family. Job losses also impact the community at large.

Moreover, the quantum payable is reduced by capping back wages and allowing for reductions by taking into account income earned by the workman after dismissal, delays, contributory behaviour and mitigation of loss. When a dismissal

31 [1998] 2 ILR 831.
32 Ibid at 835.

has been found to be without just cause or excuse and in view of the right to employment being recognised as a fundamental constitutional right, then surely the above approach in computing the quantum of compensation payable in lieu of reinstatement is found wanting. Having lost his/her job, it would only be natural for an employee to regain employment as soon as possible in the interest of personal and family obligations unless extenuating circumstances prevent subsequent employment. Thus as seen in *R.Ramachandran*, the claimant was already 51 years of age after having had to wait seven years for his application to be brought before the courts. He had been jobless for seven years and could not fit back into the workplace. In recognizing the difficulty of ordering reinstatement, Eusoff Chin CJ, noted that " ... sending him back ... will cause more mental distress and suffering. The appropriate remedy is to grant him compensation for loss of employment".[34] Loss of future earnings was also computed into the compensation awarded. Thus these cases are examples of how the courts are beginning to recognise the need to protect employment rights by considering both reinstatement where possible and the alternative of compensation in lieu where it is not.

Another consequence of recognising the right to employment as a fundamental and proprietary right, involves the question of the different types of damages that may be awarded for breach of the contract of employment. *Addis v Gramaphone Co Ltd* [35] was the authority for the view that compensatory damages were not recoverable for injured feelings, ie, an employee cannot recover damages for the manner in which the wrongful dismissal took place, for injured feelings or for any loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment.[36]

However, the House of Lords in *Malik v Bank of Credit and Commerce International SA*[37] held that damages are recoverable for injury to reputation which prejudicially affects an employee's future employment prospects for breach of the implied term of mutual trust and confidence. The appellants had claimed damages for financial losses allegedly suffered because of the stigma attached to their reputations as former employees of Bank of Credit and Commerce (BCCI) which collapsed on allegations of corruption and fraud. Lord Nicholls of Birkenhead noted that, "Employment and job prospects are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly ... An employment contract creates a close personal relationship where there is often disparity of power between the parties. Frequently the employee is vulnerable ... Employers must take care not to damage their employees' future employment prospects by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards of the implied trust and confidence term". Thus, by the use of the implied term of mutual trust and confidence, Malik's case has extended the award of

34 Ibid at 185.
35 [1909] AC 488.
36 Ibid, *per* Lord Loreburn at 491.
37 [1997] IRLR 462.

compensatory damages to former employees whose future job prospects may be damaged by their former employer.

In Malaysia, in *Penang Port Commission v Kanawangi s/o Superumaniam,*[38] the Court of Appeal refused to allow the award of damages which had been granted by the Industrial Court to compensate the respondent for the "distress, anguish, anxiety, inconvenience, embarrassment and humiliation", suffered upon termination. Mahadev Shankar JCA stated that damages could not be awarded for the manner of dismissal or for loss sustained from the dismissal itself which had made it more difficult for him to obtain fresh employment. It is unfortunate that such a view was taken especially since by then the Court of Appeal's decisions in *Tan Teck Seng* and *Hong Leong Equipment* were providing a new jurisprudential base to security of tenure. It is submitted that a golden opportunity was lost when the Court of Appeal refused to see the social policy implications of awarding compensatory damages to the employee for injury to reputation or future loss of job prospects as a social policy approach to the question of job security.

In addition, by expressing the right to employment as a fundamental Constitutional right public law remedies are now more accessible. The right to a hearing under the rules of natural justice before dismissal is available to public sector employees as per Article 135 of the Federal Constitution but not so in the case of private sector employment. Due inquiry is, however, required in the case of a dismissal for misconduct under section 14(1) EA 1955. With the introduction of the requirement of due inquiry or procedural fairness into s 14(1) EA 1955, it was hoped that s 20(1) IRA 1967 which is silent on this issue could be construed to include such a right. Unfortunately the Federal Court has rejected such a construction. The Supreme Court decision of *Dreamland*[39] was supported by the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Anor,*[40] when it stated that under the "curable principle", the failure of the employer to hold a pre-dismissal inquiry could be cured by the Industrial Court hearing subsequently and that the Industrial Court's powers were twofold, firstly to determine whether the misconduct cited by the employer has been established and secondly whether the misconduct amounted to just cause or excuse. Thus here, the failure to hold a domestic inquiry was held to be a procedural irregularity (and not as ruled in earlier cases, to be a nullity for the lack of procedural fairness under the rules of natural justice) which could be cured by the Industrial Court's own inquiry into the matter. This had been noted in *Milan Auto Sdn Bhd v Wong Seh Yen,*[41] where the Federal Court held that the failure to hold a domestic inquiry was not fatal to the employer but merely an irregularity which required the employer to prove to the Court that there was just cause and excuse for dismissing the employee by providing all the relevant evidence to the Court.[42]

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38 [1996] 3 MLJ 427.
39 *Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 112.
40 [1995] 2 MLJ 753.
41 [1994] 2 MLJ 135.
42 For an interesting discussion on the above issues, see V Anantaraman, *Malaysian Industrial Relations – Law & Practice*, (Universiti Putra Press 1997) at 258 – 270.

These cases were decided before the employee's right to employment was recognised in *Tan Teck Seng* as a fundamental right. Indeed, it has been noted that " ... it would be a travesty of justice if this court's recognition of pre-dismissal inquiry of the public sector is not extended to the "hapless" workers in the private sector".[43]

As such, in the light of these latest developments the decision in *Hong Leong Assurance* could not hold. Under the rules of natural justice, the duty to act fairly requires that an employee is dismissed only for "a just cause after due process". If employment is a fundamental Constitutional right then surely such a right deserves to be protected by procedural fairness. The effect of the Federal Court's ruling in *Milan Auto* and *Hong Leong Assurance* puts employers in a dilemma in that they may not need to conduct a domestic inquiry before dismissing a workman as this procedural irregularity could be cured by the Industrial Court.[44]

The "unfortunate consequence" of allowing employers to apparently breach their statutory and contractual obligations of conducting due inquiry before a dismissal was noted in the Federal Court's recent decision in *Said Dharmalingam Abdullah v Malayan Breweries (Malaysia) Sdn Bhd,*[45] and which has now reaffirmed the pre-*Dreamland* view that the dismissal of an employee without due inquiry will be void. Here Edgar Joseph Jr FCJ noted in his decision that, "Speaking generally, where the relationship is that of master and servant, we are normally in the field of the common law of contract and so, the principles of administrative law – which, of course, must include the fundamental rule of natural justice ... would not apply. On the other hand, where the employment is in the public sector or where statutory or other protection is conferred, procedural safeguards will have to be observed".[46] The statutory right referred to is that under section 14 (1) EA 1955, which requires due inquiry by the employer before dismissing the employee for a misconduct. The learned judge then distinguished *Dreamland* and *Hong Leong Assurance* on the basis that in both cases, the claimants were not employees within the statutory income limitations stated under the EA 1955 to qualify as an "employee" for the purpose of the section 14 (1) right to "due inquiry".

With respect, this view is untenable as it then limits the categories of workers who have the statutory right to procedural fairness as including only those that fall within the statutory income bracket under the EA 1955. Thus those private sector employees outside the monetary limit will be excluded from a right to due inquiry before they are dismissed.

This interpretation by the Federal Court surely restricts an employee's fundamental constitutional right to his employment which includes the right to procedural

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43 V Anantaraman, "Revisionism of the Restructured Judiciary in Malaysian Industrial Relations", (1997) 1 MLJ at cxiii.

44 For a critical view of the effect of the Federal Court's ruling, refer to Industrial Court Chairman, Lim Heng Seng's views in *Perusahan Kemas Maju Sdn Bhd v Ramli Abu Hassan,* Award No 250 of 1994 at 124.

45 *[1997] 1 MLJ* 352.

46 Ibid at 358

fairness. As noted by the learned judge himself, " ... where statutory or other protection is conferred, procedural safeguards will have to be observed". This protection is also conferred on every employee under Article 5 of the Federal Constitution (in that the right to life includes the right to employment) and as such, procedural safeguards must follow. The term "employee" must include anyone in an employment relationship, which today is confined within the framework of the contract of service. One's income bracket should not be the yardstick for the protection of a constitutional right. The loss of employment affects every employee similarly although the degree of "suffering" may differ depending on the individual's economic strength at the time of dismissal.

Another public law remedy that has recently been accepted by our courts is the moulding of relief in relation to industrial disputes. In *R Rama Chandran*, Edgar Joseph Jr FCJ[47] noted that there were recognised classes of cases which interfered with human rights or which put life (including the right to employment as recognised in *Tan Teck Seng*) or liberty at risk for which public law remedies were available. The Federal Court in the interest of justice and to avoid further delay to the appellant who had been unemployed for seven years and was already 51 years of age, ordered the consequential relief sought instead of remitting the matter back to the Industrial Court. The court stressed that " ... whenever legally permissible, we must demonstrate a willingness to mould remedies available to suit the justice of the case".[48]

What the above cases display is the fast expanding scope for the application of public law principles and remedies in the arena of private law rights which have been conferred and based on contract law. By moving the right to employment from the realms of private law into public law, ie, that the right to employment is a fundamental liberty under the Federal Constitution, the courts are then empowered to scrutinise employers' decisions in relation to the employees for substance as well as process as was seen in *R Rama Chandran*. In *Tan Teck Seng*, the dismissal of the claimant headmaster was quashed by the Court of Appeal on the ground that the dismissal was too extreme a punishment in the circumstances and called for a reduction in rank. The learned judge was applying the doctrine of proportionality albeit indirectly.

Conclusion

As has been acknowledged in the UK, the courts have found it difficult in interpreting statutory employment protection provisions, to move beyond the contract of employment. Steven Anderman notes, "The root cause of these difficulties has been the judicial tendency to refrain from treating statutory employment protections as an independent layer of regulation subject to its own values and assumptions even when regulating contractual employment relations".[49]

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47 Note 45 at 190.

48 Note 45 at 197.

49 Steven Anderman, "The Interpretation of Protective Employment Statutes and Contracts of Employment", ILJ Vol 29 No 3 September 2000.

In Malaysia, the situation is somewhat reversed. It is the legislature that lags behind judicial interpretation of the employment relationship and the issue of security of tenure. The inadequate definitions of "employee", "workman", the provisions of section 14 EA 1955 etc, are but examples. We have a 'living document' in our Federal Constitution that provides a fundamental, constitutional right to employment, which is seen as a proprietary right. Thus if the employment relationship can be seen as going beyond the mere contractual framework that defines it, then we have surely moved beyond contract to a social policy approach. The right to employment will prove to be meaningless as a fundamental right under our Constitution unless it is recognised and safeguarded by the legislature and courts as such.

Postscript

The writer notes the recent Federal Court decision in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 may impact restrictively on the above observations based on the right to employment being recognised as a constitutional right. The matter was discussed in relation to the question of whether the exclusion of the right to be heard with regards to the cancellation and revocation of the respondent's entry permit into Sabah (which effectively caused the respondent to lose his right to livelihood) was unlawful and unconstitutional under Articles 5 and 8 of the Federal Constitution. Mohamed Dzaiddin FCJ in delivering judgement at p 101 treated the words 'life or personal liberty' under Article 5 conjunctively so that, "In our view, the words, 'personal liberty' should be given the meaning in the context of Article 5 as a whole" and adopted Suffian LP's approach in *Loh Wai Keong,*[50] ie, "personal liberty, not of liberty simpliciter". His Lordship lamented the fact that in neither *Tan Teck Seng* nor *Rama Chandran* or even for that matter, the instant case, was mention made of *Loh Wai Kong*. His Lordship thus disagreed with the Court of Appeal's wider interpretation of "life" than mere existence and that life and personal liberty should include all those facets that are an integral part of life and which go to form the quality of life. His Lordship then went on to note that "other matters which go to form the quality of life" have been enshrined under the fundamental liberties of Articles 7-13 of the Federal Constitution.

With respect, the above views can be challenged on various grounds: First, it was indeed clearly expressed by Suffian LP in *Loh Wai Kong* that the meaning of words used in the Constitution "take their colour from the context in which they appear" and thus may be construed widely or restrictively. In *Loh*'s case the court was interpreting "personal liberties" and not the word "life" itself. Thus to solely base *Sugumaran*'s final appeal on a meaning given for "personal liberties" because the words "life" and "personal liberties" have been read conjunctively is restrictive. It is then not surprising that none of the cases mentioned by his Lordship noted the interpretation as given in *Loh*'s case.

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50 *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33.

Secondly, by interpreting the words "life" and "personal liberties" conjunctively and thus literally, the Federal Court is closing the door on the recognition and, therefore, protection of rights recognised as being fundamental rights to-date. It is the purposive approach and not the literal approach that breathes life into the interpretation of our Federal Constitution. And, what more when the right involved is something as basic to our existence as the right to employment.

Thirdly, the fact that other matters that go to form the quality of life are enshrined in Part II of the Federal Constitution under Articles 7 to 13 does not mean that the quality of life only refers to the rights enumerated. Is the right to employment also not a similar category of rights as rights to education, equality and religion?

In addition, the Federal Court's decision in *Sugumaran* should turn on its facts as it dealt with the special immigration powers of Sabah and Sarawak. As the court noted, the respondent's right to set up legal practice was incidental to the right to enter and reside in Sabah. The entry permit did not confer any right to livelihood to the respondent. Semantics aside, surely one could not come without the other ie there is no right to set up a legal practice in Sabah unless one has an entry permit to reside in Sabah.